IN THE HIGH COURT OF UTTARANCHAL

AT NAINITAL.

TRADE TAX REVISION NO. 410 OF 2001.

ACCEL ICIM SYSTEMS & SERVICES Ltd. . Applicant.

VERSUS

Commissioner, Trade Tax,Uttaranchal. ... Opp.Party.

RAJESH TANDON J.

By the present revision the applicant has prayed for setting aside judgment dated 14th September, 2001 passed by the Tribunal.

Briefly stated the revisionist is engaged in the business of computers, Hardware manufacturing, trading, manufacturing, assembling and all types of computers.

Applicant has submitted that M/S BHEL Haridwar made orders for networking of computers machines in the premises of BHEL and, as such, the applicant had leased out the services to the said company under the supervision, maintenance and guidance of technical staff of the company.

The assessing authority imposed a sum of Rs 79,517.00 towards the trade tax alongwith 2% interest per month.

The order passed by the assessing authority being exparte and, as such, the application was filed for recalling of the said order under section 30 of the Act but the assessing authority has rejected the application on 27th anuary, 2001.

The revisionist aggrieved by the aforesaid order preferred an appeal before the Assistant Commissioner (Judicial) Trade Tax Dehradun, the appellate authority, has rejected appeal dated 30th March, 20012.

Aggrieved by the aforesaid order the applicant has preferred a second appeal before the Tribunal. The appeal

was rejectded on 14th September, 2001. Following questions of law was framed by the Tribunal:

(i) Whether the situs of sale of goods between the revisionist and M/S BHEL took place at Haridwar as has been held to be by the Assessing authority and confirmed by lower appellate authority?

(ii) Whether leasing of computer machines and rendering services thereof through their own Engineer by Revisionist at BHEL premises at Haridwar is a transfer of right to use goods as contemplated under Section 3-F of the U.P. Trade Tax Act?

(iii) Whether on the facts and circumstances of the case Trade Tax Tribunal was legally justified to uphold the order passed by the Assessing Authority, the first appellate court which failed to make reduction in the trade tax levied under section 3-F in view of the exemptions contemplated under section 3,4 and 5 of the Central Sales Tax Act?

(iv) Whether the transfer of right to use the soft ware computer was a commercial transaction between the revisionist and M/S BHEL and as such was liable to be levied with trade tax?

Similar controversy came up in 2004 before the Division Bench of the Uttaranchal High Court in M/S Tata Elxsi Ltd. Vs State of Uttaranchal and others.It was held as under:

"As stated above in this case we are concerned with application of the above principles of law to the facts of this case. As stated in the judgment of the Supreme Court in TELCO's case (supra) each transaction has to be examined by the Assessing Authority. In this connection, the Assessing Authority has to ascertain Whether the movement of the goods sold is contemplated be the terms of contract of sale or by a convenant

or whether the movement of goods sold is incidental to the contract of sale. In the present case it is alleged that at the time of execution of lease dated 11th January, 1995 and 10th December,1999, the goods, were not in existence. The Assessing Authority is bound to give a finding on this allegation after examining the terms and conditions of the lease, rental order, invoice and accounts of the petitioner. If the Assessing Authority finds that computers were not in existence on the date of the lease then he has to consider also the status of the purchase order. He has to find out whether the purchase order was an integral part of lease or whether purchase order was a separate transaction vis-a-vis lease. In this case the petitioner had handed ovr the above documents to the Assessing Authority but the same were returned. In the assessment order there is no discussion on the terms and conditions of the lease, the purchase orders, the invoices etc. The Assessing Authority was also required to consider the difference int eh connotation of the words "unascertained goods' vis-a'vis "non-existent goods" on the date of the lease. In view of the judgment of the Supreme Court in 20th Century Finance Corporation Ltd. (supra) the Assessing Authority was required to keep in mind the difference between the tax on 'use of goods' and the tax on the 'transfer of the right to use' the goods in the context of inter-State sale. It is in these circumstances that the matter needs to be remanded back to the Assessing Authority. There is one more aspect which the Assessing Authority needs to consider in this case. There are two sets of suppliers in this State. The second set of suppliers are from U.S.A. and U.K. The invoices in the two cases are different. The Assessing Authority will have to ascertain the privity of contract. Was such privity between Bharat Heavy Electricals Ltd. and petitioners or was there a privity of contract between suppliers and Bharat Heavy Electricals Ltd. The principles mentioned above are not exhaustive. Ultimately one has to go by the facts of each case in order to decide whether the transaction of sale is connected with the movement of goods so as to be regarded as inter-State sale. Since the Assessing

Authority has not considered the material facts of these transactions in question we have no option but to remand the matter back to the Assessing Authority. We have taken on record the lease agreement including the annexures thereto, the invoices, the purchase orders and other relevant documents. The Assessing Authority can call upon the petitioner to supply any other document which he deems fit to consider. The Assessing Authority will also consider the books of accounts of the petitioner in a matter of purchase of computes-accessories from various suppliers/manufacturers and the accounting treatment given such transactions. We do not wish to express any opinion on merits of this case.

In the circumstances, following ordr is passed: -

ORDER

(a) *Writ Petition is allowed in terms of prayer clauses (ii) and (iv) and accordingly the assessment order dated June 30th 2003 concerning Assessment Year 2000-2001 and the show cause notice dated 7th August, 2003 are set aside. Similarly we allow Trade Tax Revision No.411 of 2001 and we set aside the decision of the Tribunal dated 14th September 2001 concerning Assessment Year 1998-1999. Similarly, we allow Trade Tax Revision No.412 of 2001 concerning Assessment Year 1999-2000. Similarly, we allow Trade Tax Revision No.413 of 2001 and we set aside the order of the Tribunal dated 14th September 2001 concerning provisional assessment made by the Department for June 2000.*

(b) *During the pedency of the above matters in this Court, the petitioners have deposited amounts/given bank guarantee to the Department. These amounts have been deposited and the bank guaratees have been given subject to the result of the present cases. Since the petitioner has succeeded the amounts deposited will be returned to the petitioner without interest so also the*

bank guarantee shall be returned to the petitioner duly discharged. However, it is made clear that the matters are remanded back to the Assessing Authority. The Assessing Authority will decide the matters de novo in accordance with law within three months from the date of the receipt of this order. The Assessing Authority will hear the petitioner and thereafter give reasons while deciding the matter in accordance with law.

Accordingly, Writ Petition No. 792 of 2003 with T.T.R. No. 411 of 2001 with T.T.R. No. 412 of 2001 shall stand disposed of with no order as to costs."

The matter is remanded to the assessing authority for deciding the same in terms of the order passed in writ petition No.792 of 2003.

The revision is allowed in terms of the order passed in the light of the judgment of the court.

Dated:05.10.2004. **(Rajesh Tandon j)**

S.S.Negi.